

# **WISCONSIN LEGISLATIVE COUNCIL STAFF**

## ***RULES CLEARINGHOUSE***

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## **CLEARINGHOUSE RULE 98-204**

### **Comments**

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

#### **1. Statutory Authority**

a. The provisions of the rule relating to criminal history background checks seem curiously placed. Section 48.685, Stats., places oversight of the criminal history and child abuse record search within the purview of the Department of Health and Family Services (DHFS). It is not clear why the Department of Workforce Development (DWD) is promulgating these rules as certification criteria. It appears that DHFS has the statutory authority to apply its rules on criminal history and child abuse records searches to certified day care providers. [See, e.g., s. 48.685 (2) (a), Stats.] In addition, it is clearly contemplated in the statutes that certified day care providers would have to meet the certification standard established by DWD and the criminal history and child abuse record search provisions within the purview of DHFS. [See s. 48.651 (1) (intro.), Stats.]

Promulgation of this rule will only unnecessarily duplicate the extensive rule being promulgated by DHFS. It is suggested that to avoid such duplication, the DHFS rule be expanded to cover certified day care providers and this rule be amended to simply cross-reference the DHFS rules as being applicable to certified day care providers and associated persons.

b. In light of the above comment, it is apparent that s. DWD 55.10 (4) is being promulgated without statutory authority. Section 48.685 (6) (c), Stats., provides that a person who provides false information may be subject to the statutory penalty or other sanctions

specified “by the department by rule.” However, the “department” referred to in the statute is DHFS, not DWD.

## 2. Form, Style and Placement in Administrative Code

a. SECTION 1 of the rule purports to renumber ss. HFS 55.55 to 55.62 as DWD 55.01 to 55.08. However, based on the content of the rule, the numerous cross-references to s. DWD 55.09 and the number of sections that occur between current ss. HFS 55.55 to 55.62, the renumbering is insufficient and should instead go to s. DWD 55.09. If something different is intended, then the rule should be reviewed to correct all of the cross-references to s. DWD 55.09.

b. SECTIONS 1 and 2 of the rule, which affect rules with an HFS prefix, should follow the SECTIONS that affect rules with a DWD prefix.

c. The rule should be reviewed to make sure that solid lines are used consistently throughout for underscores and strike-throughs. For example, the amendment in s. DWD 55.02 (4) appears to be underscored by a broken line, not a solid one.

d. In SECTION 13 of the rule, it appears that nearly all of the existing provisions being amended have titles. The titles should be shown in SECTION 13. [See s. 1.05 (3) (c), Manual.]

e. Reference is made in s. DWD 55.04 (3) (d) 2. to “the department of health and family services.” Should the rule instead refer to “the department,” so that DWD is the agency referred to?

f. In s. DWD 55.04 (5) (a) and (b), the parenthetical references should be avoided. [See s. 1.01 (6), Manual.] The terms could be defined in the definitions section or a note could be added which further identifies the parenthetical terms.

g. It is inappropriate drafting style to renumber s. HFS 55.59 to become s. DWD 55.05 and then, in SECTION 15, repeal and recreate s. DWD 55.05. The rule should repeal s. HFS 55.59 and create s. DWD 55.05.

h. In s. DWD 55.05 (2) (intro.), the phrase “with an employe, a contractor or a nonclient resident” should be deleted as the term “covered transaction” is defined in the definitions provision in the rule.

i. In s. DWD 55.05 (6) (f) 3. b., “may” should replace “has the right to.”

j. In s. DWD 55.05 (7) (b) (intro.), the introductory material should end with a colon rather than a period. Also, the format of subds. 1. to 3. is problematic. If the first two words in each subdivision are a title, they should be drafted in proper form, i.e., they should be in single quotation marks. [See s. 1.05 (2) (e), Manual.] In addition, the remainder of the material in each subdivision should be either drafted as complete sentences or separated into individual subdivision paragraph lists.

k. Because s. DWD 55.08 (3) contains a title, the title should be shown when the provision is amended. [See s. 1.05 (3) (c), Manual.]

l. Section DWD 55.10 (1) (intro.) should be changed to sub. (1) (a). Accordingly, pars. (a) and (b) should be renumbered pars. (b) and (c), respectively. Also, the references to “sub. (1) (intro.)” should be changed to refer to “par. (a).” This comment also applies to the provisions in sub. (2). A similar change is needed in s. DWD 55.05 (6) (intro.).

m. In s. DWD 55.10 (3) (a), “offense” is misspelled.

n. The creation of the “crimes table” in s. DWD 55.11 raises several issues. First, s. DWD 55.11 (1) indicates that the purpose of the table is to provide the list required by s. 48.685 (7) (a) and (b), Stats. However, that statutory section requires DHFS to promulgate the relevant lists, not DWD. Thus, the purpose statement lacks accuracy. Second, the section lacks a sub. (2). [See s. 1.03 (intro.), Manual.] Third, if the crimes list produced in s. DWD 55.11 is to be interpreted in a manner consistent with the crimes list established in Appendix A to s. HFS 12.11, which has not yet been promulgated as a permanent rule, why not just include a cross-reference to that list rather than repeat the whole list in this rule? This would avoid duplicating an existing rule and would eliminate the need to change the list whenever DHFS changes its list. Finally, if a table is going to be used, it should be clearly designated and created as Table 55.11 rather than folded in with a substantive provision of the rule. It may also be advisable, if it is deemed necessary to include a crimes list, to create the list as an appendix to the rule rather than a table.

#### **4. Adequacy of References to Related Statutes, Rules and Forms**

a. Section DWD 55.02 (5m) refers to a provider certified under s. 48.65, Stats. That statutory section, however, relates to licensed providers. Perhaps the cross-reference should be to s. 48.651, Stats.

b. In s. DWD 55.04 (9) (a) 6., and elsewhere throughout the rule, reference is made to Table DWD 55. A more adequate and complete cross-reference is necessary. See comment 2. i.

c. In s. DWD 55.04 (9) (b), a county agency must “ensure appropriate precautionary measures” are taken. Are there examples somewhere in the rule of what these measures are? An appropriate cross-reference should be provided to better guide county agencies in taking this action. Also, the last sentence of par. (b) starts with the word “This.” What is “This” referring to? Is the delay in issuance of a certification one of the appropriate precautionary measures or is it a result of the precautionary measures?

d. In s. DWD 55.05 (6) (e) (intro.), the rule refers to “the department’s review procedures.” What are these procedures? An appropriate cross-reference to these procedures should be provided.

e. The “statutory penalty” referred to in s. DWD 55.10 (4) (intro.) should to be identified with a cross-reference to the actual statutory provision. The note can explain the

statutory penalty, as it does. In par. (d), the phrase “but not limited to” is unnecessary and should be deleted. In par. (e), the phrase “that the” after the word “assessment” should be changed to “to determine if the.” Also, what must the person be “fit and qualified” for? The rule should be clarified.

f. It appears that the cross-references in s. DWD 55.10 (10) (b) are incorrect. Section DWD 55.10 (4) (b) 7. and 8. do not exist and sub. (4) (c) does not appear to relate to rehabilitation reviews. The cross-references should be reviewed.

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. In s. DWD 55.02 (4m) (a), it is not clear how a “person acting” as an operator would be considered a “covered transaction.” Is it the person’s “acting” that makes it a transaction? Generally, a transaction involves more than one person. Perhaps the “covered transaction” occurs when the person acting as an operator takes in clients? The meaning of par. (a) should be clarified.

b. Section DWD 55.03 (2) (c) refers to both “W-2” and a “W-2 agency.” However, neither of these terms are defined in the rule. They should be.

c. In s. DWD 55.04 (9) (a) 4., it appears that the phrase “or sexual” should be inserted between the words “contact intercourse.”

d. In s. DWD 55.04 (9) (c), it appears that the phrase “the county agency may employ” in the first sentence should be changed to “the certified operator may employ.” In the second sentence after the phrase “receipt and review,” one of the occurrences of the phrase “of the” should be deleted.

e. In s. DWD 55.05 (6) (a), the phrase “with the burden of proof” in the last sentence should be deleted.

f. In s. DWD 55.05 (6) (f) 3. a., it appears that both uses of the term “county department” should be changed to “agency” or “county agency.”

g. Section DWD 55.05 (6) (f) 4. is somewhat awkwardly drafted. Perhaps the last part of it could be rewritten as follows: “the rehabilitation review decision, including a copy of the written decision and any decisions from filed appeals that may result.”

h. In s. DWD 55.05 (6) (g) (intro.), the phrase “one or more” should be deleted. Also, in subd. 3., it appears that the word “pertinent” can be deleted because it is rendered redundant by the word “relevant.”

i. In s. DWD 55.05 (6) (h), the phrase “as applicable” in the second sentence appears unnecessary and should be deleted.

j. In s. DWD 55.05 (6) (i), the first sentence should be clarified by adding at the end of the sentence the phrase “under this section.” The second sentence should be written in the active voice to clarify who has the duty to report.

k. In the note to s. DWD 55.05 (6) (j) 1., the phrase “the other county” should be changed to “another county.” For purposes of consistency, in subd. 2., the phrase “review application request” in the first sentence should be deleted.

l. In s. DWD 55.05 (6) (k), the phrase “review and inform the applicant” in the third sentence should be expanded to “review and shall inform the applicant of that fact.”

m. In s. DWD 55.05 (8) (b) (intro.), the phrase “but not limited to” is unnecessary and should be deleted. In subd. 4., the comma after “psychiatrists” should be deleted.

n. In s. DWD 55.05 (9) (b), what is “other community information”? Is it defined somewhere? Perhaps a note could be provided explaining what types of information is included in this term.

o. In s. DWD 55.05 (9) (c), it appears that the phrase “children in care” could be replaced by the term “clients” which is defined in the definitions section of the rule.

p. In s. DWD 55.10 (1) (intro.), the phrase “prospective employe” should be better identified. For whom will the prospective employe work?

q. In s. DWD 55.10 (3) (a), what does the phrase “by the next working day” refer to? What day triggers this requirement?

r. Section DWD 55.10 (5) (d) could be clarified by rewriting the end of the provision as follows: “substantiated reports that the person committed acts of child abuse or neglect.”

s. In s. DWD 55.10 (6), the rule refers to a person residing outside of this state within “the previous three years.” What date is the trigger point for this time frame? The date of application? The date of the request for a background check? Some other date? The rule should be clarified. See, for example, s. 48.685 (2) (bm), Stats.

t. In s. DWD 55.10 (8) (c), what are the “applicable confidentiality requirements” referred to?

u. In s. DWD 55.10 (10) (intro.), it appears that the phrase “an entity” should be inserted before the phrase “need not bar.” Also, what does the phrase “until and if” mean? If an entity may retain someone “until and if” a certain decision is reached, how long is this? Do the words “until” and “if” as used in this context not cancel each other out? Is the intent that an entity can retain someone until a decision is reached and if the decision is favorable, may continue to retain them? The rule should be clarified.